



MONTGOMERY COUNTY ETHICS COMMISSION

Kenita V. Barrow
Chair

Mark L. Greenblatt
Vice Chair

March 2, 2015

Advisory Opinion 15-02-004 Waiver 15-02-004

Stanley Boyd is a Member of the Board of Appeals. He has approached the Ethics Commission for an advisory opinion on an issue of law, and, if necessary, a waiver of a particular restriction if it is deemed to apply.¹

Mr. Boyd became an elected member of the Executive Committee of the Maryland Chapter of the Sierra Club on January 17, 2015. "Ethan Goffman, Sierra Club" is identified as one of the *Groups Opposing the Petition* of Costco Wholesale Corporation (Costco) to obtain a special exception to build a gas station at Westfield Wheaton Mall.

The Ethics Commission has determined to issue a waiver of the applicable ethics prohibition so that Mr. Boyd may consider, so far as Montgomery County Ethics Laws are concerned, the Costco Petition. The Commission identifies some other considerations beyond its jurisdiction relevant to Mr. Boyd's consideration of the Costco matter.

I. Applicability of Section 19A-11 of the Public Ethics Law

Section 19A-11(a)(2)(A) concerns conflicts of interest of public employees. It provides, in relevant part:

19A-11. Participation of public employees.

(a) *Prohibitions.* Unless permitted by a waiver, a public employee must not participate in:

...

¹ Normally, where an advisory opinion is issued, the identity of the person seeking the opinion remains confidential. Similarly, where an application for a waiver is considered and denied, the waiver request is confidential. Waivers that are granted are required to be published. . . . Here, with the consent of Mr. Boyd, the Ethics Commission is publishing the advisory aspects of this waiver as it is part of the response to the granted waiver request.

(2) any matter if the public employee knows or reasonably should know that any party to the matter is:

(A) any business in which the public employee has an economic interest or is an officer, director, trustee, partner, or employee[.]

Mr. Boyd seeks the advice of the Ethics Commission as to the applicability of Section 19A-11(a)(2)(A) of the Public Ethics Law to his participation in the consideration of the Costco petition. More specifically, the issue is whether Mr. Boyd's being on the executive committee of the Maryland Chapter of the Sierra Club constitutes his being an officer of a party to the Costco matter before the Board of Appeals. Mr. Boyd submits that it is the Montgomery County Group of the Sierra Club and not the Maryland Chapter that is listed as a party of record in the case. The Ethics Commission concludes that the Maryland Chapter of the Sierra Club and the Montgomery Group of the Sierra Club share a sufficient identity, along with the national Sierra Club, to constitute the same party for purposes of application of Section 19A-11. Mr. Boyd, being on the executive committee of the Maryland Chapter of the Sierra Club is prohibited from working on the Costco matter in which the Montgomery County Group of the Sierra Club is a party unless the Ethics Commission waives the application of Section 19A-11.

According to Standing Rule 1.1.1 of the Sierra Club's Bylaws & Standing Rules (Nov. 16, 2013 revision), the Sierra Club is "One Corporation" and "[a]ll Club chapters, groups, committees, teams, and task forces are subunits of the Club" Groups are established by chapters and "are fundamental organizing units of the [Sierra] Club, responsible to the Club and their chapters for acting in furtherance of Club policies and rules" Standing Rule 8.3.

While Mr. Boyd suggests that the Maryland Chapter of the Sierra Club is not a party to the Costco matter because the Montgomery County Group of the Sierra Club became involved without the knowledge of the Maryland Chapter, the Ethics Commission finds that the separate parts of the Sierra Club are part of the larger Sierra Club organization, and that the Sierra Club as "One Corporation" is a party to the Costco petition. Further, Mr. Boyd's status as an officer of the Maryland Chapter renders him an officer of the Sierra Club as a whole.

The Commission notes that there is a relevant exception to Section 19A-11. Section 19A-11(b)(1) provides:

If a disqualification under subsection (a) leaves less than a quorum capable of acting, or if the disqualified public employee is required by law to act or is the only person authorized to act, the disqualified public employee may participate or act if the public employee discloses the nature and circumstances of the conflict.

Here, where there are four other members of the Board of Appeals who may act in the matter, there is no question of whether a quorum is present. The Montgomery County Zoning Ordinance provides at 59-A-4.122 that "not less than 3 members of the Board

constitutes a quorum.”² For the Board of Appeals to grant a special exception, a vote of a supermajority of four of the Board is required. See Zoning Ordinance at 59-A-4.123. The exception to Section 19A-11 also makes reference to the “only person authorized to act.” If one of the Board Members were unavailable to participate in the consideration of a petition for a special exception, the remaining four officials would each be in the status of “the only person[s] authorized to act” since four members are needed to act. (While the exception appears to address individual authority to act, there is no reason the provision should be limited to individuals when all members of a finite group constitute the only persons who are authorized to take an action.) But this exception does not apply in the current instance because all of the Board members aside from Mr. Boyd are available to participate in the matter.

Accordingly, the Commission concludes that without a waiver, Mr. Boyd is prohibited from participating in the Costco petition by the prohibition of Section 19A-11.

II. Code Section 2-109

Before addressing the issue of whether a waiver of Section 19A-11 should issue, the Commission addresses a separate provision of the County Code appearing at Section 2-109. As discussed below, the Ethics Commission concludes that this provision does not prohibit Mr. Boyd from participating in the Costco petition matter.³

Section 2-109 specifically addresses conflicts of interest of Board of Appeals members:

(b) *Conduct prohibited.* No member shall:

(1) Decide or participate in a decision in which he has a financial interest, as owner, member, partner, officer, employee, stockholder or other participant of or in any private business or professional enterprise that will be affected by such decision, nor shall a member knowingly participate in a decision affecting a person related to him or his spouse as father, mother, brother, sister or child. This section shall not be construed to prohibit a member from having or holding private investment, business or professional interests, but shall be construed to apply when such interests are or reasonably may be in conflict with the proper performance of duty by the member. Such interests shall be presumed to be in conflict with proper performance of duty by the member when he or his spouse, or the father, mother, brother, sister or child or either, jointly or severally, owns a total of more than three (3) percent of the invested capital or capital stock of any

² The references to the County’s Zoning Ordinance are to the Zoning Ordinance in place at the time of the initiation of the Costco petition.

³ Section 19A-7 specifically references Section 2-109 as being a statute on which the Ethics Commission may give advice. While the Ethics Commission is authorized to issue an opinion concerning the applicability of Section 2-109, interestingly, no express authorization is made for the Ethics Commission to issue a waiver of Section 2-109 in Section 19-8(a).

groups, firms, corporations or associations involved in the decision being made by the board of appeals or receives a total combined compensation of more than five thousand dollars (\$5,000.00) per year from any individual groups, firms, corporations or associations involved in the decision being made by the board of appeals. . . .

(d) *Disclosure of interests; disqualifications.* When a member has any interest as described in this section which is or reasonably may be incompatible with or in conflict with any of his official duties or acts, he shall disclose such interest publicly and he shall disqualify himself and not participate in the decision or act affected thereby. . . .

(f) *Effect of conflict of interests.* If, because of disqualification or disqualifications by interest under the provisions of this section, less than a quorum of the board of appeals is available to act upon any particular matter, except special exceptions, the remaining members of the board shall constitute a quorum and shall have authority to transact business to the extent permitted by law; provided, that this shall not be construed to permit transaction of business contrary to the quorum requirements or other provisions of state or other law.

The Ethics Commission concludes that this provision does not require Mr. Boyd to be disqualified from the Costco matter as a result of his uncompensated executive committee role with the Maryland Chapter of the Sierra Club. Section 2-109(b)(1) concerns “financial interests” including holdings and income from organizations. It reflects a presumption of conflict when a member or the member’s family is an owner of 3% of a party affected by a matter or when the member receives \$5000 in income.

The Commission notes that the language of Section 2-109(b)(1) is confusing as regards its application to Board Members in their roles as officers of an outside organization. The provision first addresses “financial interests” but then states:

This section shall not be construed to prohibit a member from having or holding private investment, business or professional interests, but shall be construed to apply when such interests are or reasonably may be in conflict with the proper performance of duty by the member.

The Commission believes that this limitation on the scope of the application of what amounts to a provision establishing presumptive disqualification for certain financial interests cannot appropriately be read to expand the scope of what may constitute a conflict of interest beyond financial interests. This conclusion is supported by the sentence which follows the quoted language above as it identifies which financial interests are presumed to be problematic: interests in entities involved in the matter that generate more than \$5,000 in income and ownership interests of 3% or more in such entities.⁴

⁴ In light of the more expansive conflict of interest provisions of Section 19A-11, the Commission is mystified as to any benefit of the confusing paragraph 2-109(b).

III. Waiver of Section 19A-11

Section 19A-8 sets forth the standard for the issuance of a waiver by the Ethics Commission. It provides:

- (a) After receiving a written request, the Commission may grant to a public employee . . . a waiver of the prohibitions of this Chapter and Sections 11B-51 and 11B-52(a) if it finds that:
 - (1) the best interests of the County would be served by granting the waiver;
 - (2) the importance to the County of a public employee or class of employees performing official duties outweighs the actual or potential harm of any conflict of interest; and
 - (3) granting the waiver will not give a public employee or class of employees an unfair economic advantage over other public employees or members of the public.

The Ethics Commission believes that Mr. Boyd's request meets these requirements.

First, the best interests of the County would be served by granting the waiver. It is in the County's interest that the statutory framework for consideration of an application for a special exception work as designed. These applications require a supermajority of the votes of Board members – four out of five. If a Board member is disqualified from participation in the matter, the applicant is required to have all four of the participants vote in favor of the project – thus one hundred percent rather than eighty percent. The Commission notes that if two members are disqualified due to conflicts, then the granting of a special exception would become impossible, and the Board would be unable to execute its function of either granting or fairly denying a petition for a special exception. While the Commission determined that the exception of subparagraph 19A-11(b)(1) to ensure a quorum and have the necessary authorized "person[s]" to take action does not apply in Mr. Boyd's case, the rationale for that exception applies to an extent here: the exception is to ensure that Government is not prevented from functioning. Disqualifying Mr. Boyd would result in the Board operating at less than full capacity which represents a significant diminution of the service it provides to the County.

As to the second criterion for a waiver, the Commission believes that the importance to the County of Mr. Boyd's participation in the Costco matter outweighs the actual or potential harm of any conflict of interest. As Mr. Boyd's submission makes clear, the Costco matter was not a matter that came before him as a member of the executive committee of the Maryland Chapter of the Sierra Club. (As a practical matter, if the matter had come before that organization, presumably the conflict of interest policy included in the Bylaws & Standing Rules of the Sierra Club would be triggered. See Standing Rule 2.2.5 concerning conflicts of interest.) There is no evidence of a predisposition of Mr. Boyd – other than the fact of his membership and his being an officer in a part of the Sierra Club organization that is separate from the part that has expressed an interest in the Costco petition. Non-participation by a member on a vote on a petition for a special exception of the Board of Appeals is the equivalent of a "no" vote.

The Ethics Commission believes that Mr. Boyd's participation in the matter is better and more important to have than what would be, effectively, an automatic "no" vote on the petition.

As to the third criterion of the waiver standard, the Ethics Commission finds that there is no "economic benefit" to Mr. Boyd, unfair or otherwise, of his being granted a waiver to participate in the Board's consideration of the Costco petition.

Accordingly, as all three criteria for the issuance of a waiver are met, the Ethics Commission grants Mr. Boyd a waiver from the application of Section 19A-11 as regards his being an officer of the Maryland Chapter of the Sierra Club.

IV. Additional Matters

While the Ethics Commission finds that Section 2-109 does not apply and grants Mr. Boyd a waiver of the restrictions of Section 19A-11 of the Public Ethics Law, the Commission notes that when the Maryland judiciary has addressed the question of recusal of quasi-judicial bodies, including the Montgomery County Board of Appeals, it has referred to the Maryland Code of Judicial Conduct. See, for example, Huntington Terrace Citizens Association v. Suburban Hospital, No. 1251, Md. Ct. App., September 10, 2013 (unreported).

The Commission acknowledges that these standards are beyond the jurisdiction and purview of the Ethics Commission. However, in the context of the Commission issuing a waiver of the application of ethics restriction contained in Section 19A-11, the Commission believes the standards applied by the Maryland judiciary to similar circumstances should be given due consideration by Mr. Boyd and the Board of Appeals.

For the Commission:



Kenita V. Barrow, Chair